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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Plaintiff,

v.

THE SEATTLE ART MUSEUM, THE
CITY OF SEATTLE, AND THE
MUSEUM DEVELOPMENT
AUTHORITY

Defendants.

NO.

PROSPECTIVE PURCHASER
CONSENT DECREE RE: 10 BROAD
STREET, SEATTLE, WASHINGTON

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16	Exhibit C:	Schedule
17	Exhibit D:	Site Use Plan
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I. INTRODUCTION

This prospective purchaser consent decree ("Decree") is made and entered into by and between the Washington State Department of Ecology ("Ecology"), the Seattle Art Museum ("SAM"), the City of Seattle ("City") and the Museum Development Authority ("MDA"). SAM, the City and the MDA are herein referred to as "Defendants."

1. WHEREAS, the purpose of this Decree is to resolve the potential liability of Defendants for known and suspected contamination at the 10 Broad Street Property in Seattle, Washington (the "Site") arising from a release or threatened release of hazardous substances, to promote the public interest by expediting cleanup activities at the Site and to facilitate the cleanup and redevelopment of contaminated properties in Seattle, Washington.

2. WHEREAS, a Site Diagram and Legal Description are attached as Exhibit A and a Site Use Plan for the proposed park is attached as Exhibit D.

3. WHEREAS, Defendants have proposed to participate in the cleanup of the Site and redevelop the Site into a sculpture park consistent with applicable City zoning provisions and comprehensive plan designations.

4. WHEREAS, SAM has entered into a contract to acquire the Site. Under the contract, SAM has the option to assign its right to purchase the Site to the City, King County and/or the MDA.

5. WHEREAS, SAM intends to assign its right to purchase the Site to the City and the City intends to purchase the Site. The MDA will obtain a property interest (by ownership, lease or license) in the Site from the City, and the MDA will perform the remedial action outlined in the Consent Decree. SAM will then obtain a property interest in the Site and will develop, operate and maintain the park.

6. WHEREAS, in the absence of this Decree, at the time they acquire the Site, Defendants would incur potential liability under RCW 70.105D.040(1)(a) of the Model Toxics

1 Control Act ("MTCA") for performing remedial actions, or for paying remedial costs incurred by
2 Ecology, resulting from past releases or threatened releases of hazardous substances at the Site,
3 and Defendants have certified that they are not otherwise currently liable under MTCA for
4 remedial action at the Site.

5 7. WHEREAS, Defendants have developed a Cleanup Action Plan ("CAP") to
6 address soil and groundwater contamination at the Site.

7 8. WHEREAS, this Decree promotes the public interest by expediting cleanup
8 activities at the Site consistent with MTCA, Chapter 70.105D RCW and its implementing rules
9 in Chapter 173-340 WAC.

10 9. WHEREAS, Defendants shall perform the remediation specified in this Decree
11 and the CAP, attached as Exhibit B, in exchange for a covenant not to sue and protection from
12 contribution actions under MTCA.

13 10. WHEREAS, Defendants' plans for the redevelopment of the Site, as shown on
14 Exhibit D, are not likely to contribute to contamination at the Site, interfere with remedial actions
15 that may be needed on the Site, or increase human health risks to persons at or in the vicinity of
16 the Site.

17 11. WHEREAS, this Decree will provide a substantial public benefit by promoting
18 redevelopment of a former commercial/industrial site and yielding substantial new resources to
19 facilitate cleanup to prevent migration of contaminants to Elliott Bay and other areas of the Site.

20 12. WHEREAS, Defendants' remedial actions will lead to a more expeditious cleanup
21 of hazardous substances at the Site than would otherwise occur, and will promote protection of
22 the public health and the environment.

23 13. WHEREAS, the Complaint in this action is being filed simultaneously with this
24 Decree. An answer has not been filed, and there has not been a trial on any issue of fact or law in
25 this case. However, the parties wish to resolve the issues raised by Ecology's Complaint. In
26 addition, the parties agree that settlement of these matters without litigation is reasonable and in

1 the public interest and that entry of this Decree is the most appropriate means of resolving these
2 matters.

3 14. WHEREAS, the Court is fully advised of the reasons for entry of this Decree, and
4 good cause having been shown:

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

6 **II. AUTHORITY, JURISDICTION AND VENUE**

7 15. This Court has jurisdiction over the subject matter and over the parties pursuant to
8 MTCA, RCW 70.105D. Venue is proper in King County pursuant to RCW 70.105D.050(5)(b).

9 16. Authority is conferred upon the Washington State Attorney General by
10 RCW 70.105D.040(4)(a) and RCW 70.105D.040(5) to enter into a settlement with persons not
11 currently liable for remedial actions at a facility who propose to purchase property if, after public
12 notice, Ecology finds the proposed settlement will lead to a more expeditious cleanup of
13 hazardous substances in compliance with cleanup standards under RCW 70.105D.030(2)(e). In
14 addition, the Attorney General may agree to the settlement if the settlement will yield substantial
15 new resources to facilitate cleanup and expedite remedial action consistent with rules adopted
16 under MTCA, and Ecology finds that the redevelopment or reuse of the property is not likely to
17 contribute to the existing release or threatened release, interfere with remedial actions that may
18 be needed at the site, or increase health risks to persons at or in the vicinity of the site. RCW
19 70.105D.040(4)(b) require that such a settlement be entered as a consent decree issued by a court
20 of competent jurisdiction.

21 17. Ecology has determined that hazardous substances have been released at the Site.
22 Ecology has not made a determination that Defendants are PLPs for the Site and Defendants have
23 certified that they are not currently liable under RCW 70.105D. Were Defendants to acquire an
24 interest in the Site, however, they could become PLPs as owners or operators under RCW
25 70.105D.040(1)(a). This Decree is entered prior to Defendants' operation of the Site, or
26 acquisition of any property interest in the Site, to resolve their potential liability for known or

1 suspected Site contamination described in reports and in the CAP and to facilitate a more
2 expeditious cleanup of the Site than otherwise would occur. This Decree is entered into pursuant
3 to the authority set forth in RCW 70.105D.040(5).

4 18. By entering into this Decree, Defendants agree not to challenge Ecology's
5 jurisdiction in any proceeding to enforce this Decree. Defendants consent to the issuance of this
6 Decree and agree to perform the remedial actions as specified in this Decree.

7 19. All Exhibits attached to this Decree are integral and enforceable parts of this
8 Decree.

9 **III. PARTIES BOUND**

10 20. This Decree shall apply to and be binding upon the signatories to this Decree.
11 The undersigned representative of each party hereby certifies that he or she is fully authorized to
12 enter into this Decree and to execute and legally bind such party to comply with this Decree.
13 Defendants agree to undertake all actions required by the terms and conditions of this Decree and
14 not to contest state jurisdiction regarding this Decree. No change in ownership or corporate
15 status shall alter the responsibility of Defendants under this Decree. Defendants shall provide a
16 copy of this Decree to all agents, contractors and subcontractors retained to perform work
17 required by this Decree and shall ensure that all work undertaken by such contractors and
18 subcontractors will be in compliance with this Decree.

19 21. Pursuant to RCW 70.105D.040(4)(e)(ii), Ecology has determined that this Decree
20 is not based on unique circumstances. Therefore, the stay of enforcement against successors in
21 interest in RCW 70.105D.040(4)(e) applies to this Decree.

22 **IV. DEFINITIONS**

23 22. Unless otherwise expressly provided herein, terms used in this Decree that are
24 defined in MTCA, Chapter 70.105D RCW, or in regulations promulgated under MTCA, Chapter
25 173-340 WAC, shall have the meaning assigned to them in MTCA or in such regulations.
26

1 Whenever terms listed below are used in this Decree or in the attachments hereto, the following
2 definitions shall apply:

3 “Decree” shall mean this Decree and all attachments hereto. In the event of conflict
4 between this Decree and any Exhibit, this Decree shall control.

5 “Paragraph” shall mean a portion of this Decree identified by an Arabic numeral.

6 “Section” shall mean a portion of this Decree identified by a Roman numeral and
7 including one or more Paragraphs.

8 “Site” shall mean the property located at 10 Broad Street in Seattle, Washington, depicted
9 on and legally described in Exhibit A, attached hereto and incorporated herein by this reference.

10 The Site is a “facility” as defined in MTCA per RCW 70.105D.020(4).

11 “Successors in Interest and Assigns” shall mean any person who acquires an interest in
12 the Site through purchase, lease, transfer, assignment, or otherwise.

13 **V. STATEMENT OF FACTS**

14 23. The Site is located on the northwest corner of Elliott Avenue and Broad Street,
15 east of Elliott Bay near Pier 70 in downtown Seattle, Washington. A Site Diagram is attached as
16 Exhibit A.

17 24. The Site was used for welding and/or automobile service operations from
18 approximately 1916 until 1973. Since 1976, the Site has been used for commercial purposes,
19 specifically a pizza restaurant and pool hall.

20 25. A number of underground storage tanks were located on the Site, but a 1975
21 demolition grading plan indicates that the tanks were to be removed.

22 26. Numerous environmental investigations have been conducted at the Site by
23 consultants for a potential purchaser of the property and by SAM. Elevated concentrations of
24 petroleum hydrocarbons have been encountered in soil and groundwater on the Site and in soil
25 just east of the Site in Elliott Avenue.

1 27. Petroleum hydrocarbons at the Site appear to be derived primarily from weathered
2 gasoline, and to a lesser degree, diesel and oil products. Gasoline-range hydrocarbons are present
3 at concentrations exceeding cleanup levels primarily within the smear zone near the groundwater
4 table along the northeastern portion of the property. Elevated concentrations of gasoline-, diesel-
5 and oil-range hydrocarbons were also encountered in near-surface soils in the center of the Site,
6 but diesel- and oil-range hydrocarbons are typically below soil cleanup levels.

7 28. BTEX compounds were also encountered at concentrations above cleanup levels,
8 in the same general vicinity as the petroleum hydrocarbons. Shallow soil samples beneath Elliott
9 Avenue also contained elevated benzene concentrations but did not contain significant
10 concentrations of gasoline-range hydrocarbons.

11 29. MTBE was detected in preliminary soil samples using a gas chromatography
12 screening method. GC mass spectrometry confirmation testing did not detect MTBE in any of
13 the soil or groundwater samples.

14 30. RI/FS HART CROWSER 1999 detected petroleum hydrocarbon vapors
15 associated with gasoline above the Method B criteria, north and adjacent to the site.

16 31. Groundwater concentrations appear to have decreased over time, possibly due to
17 natural attenuation. Gasoline-range hydrocarbons are the only contaminant that exceeded
18 cleanup levels during the most recent sampling event. Recent groundwater samples taken at the
19 western (down-gradient) boundary of the Site did not exceed cleanup levels.

20 32. These environmental conditions were reported in a Remedial
21 Investigation/Feasibility Study dated January 29, 2001. The Feasibility Study analyzed remedial
22 alternatives and identified appropriate cleanup standards as required pursuant to MTCA. Based
23 on the results of the Feasibility Study, Defendants proposed and Ecology approved a final remedy
24 as outlined in the Work to be Performed, Section VII, below and as described more fully in the
25 attached CAP (Exhibit B).

1 **VI. DESCRIPTION OF PLANNED PROJECT**

2 33. Defendants intend to acquire and operate the Site.

3 34. Defendants plan to create a public sculpture park at the Site and the adjacent site
4 recently purchased by SAM. The park will include sculptures, pedestrian trails, and landscaped
5 open space. The adjacent property to the east will also contain an underground parking lot. An
6 exhibition building and accessory structures (e.g., restrooms, espresso stands) may be placed on
7 the adjacent site. Alaskan Way will consist of a shoreline promenade, an extension of the Myrtle
8 Edwards Park waterfront bike trail, landscaped open space, possibly paved parking areas and
9 small slab-on-grade structures. Pedestrian bridges will be built to allow pedestrian crossing at
10 Elliott Avenue and the railroad right-of-way adjacent to Alaskan Way. The Site and its
11 relationship to the larger sculpture park project is depicted in Exhibit D to this Decree.

12 **VII. WORK TO BE PERFORMED, SCHEDULE**
13 **AND LAND USE RESTRICTIONS**

14 35. This Decree contains a program designed to protect public health, welfare, and the
15 environment from the known, suspected, or threatened release of hazardous substances or
16 contaminants at, on, or from the Site. The requirements of such program are described in detail in
17 this section of the Decree and in the Cleanup Action Plan (Exhibit B) and in the schedule set
18 forth in Exhibit C.

19 36. Defendants have performed the Remedial Investigation/Feasibility Study and
20 agree to perform the remedial actions herein and as described in the CAP and Schedule to
21 eliminate contaminated soil and groundwater direct contact and soil to groundwater, groundwater
22 to surface water and vapor exposure pathways to known or suspected hazardous substances at or
23 from the Site and protect human health and the environment from the release or threatened
24 release of known or suspected hazardous substances at or from the Site.

1 37. Defendants shall perform remedial actions in the attached CAP pursuant to the
2 Schedule attached at Exhibit C. Defendants, through their contractor(s) and subcontractor(s) as
3 necessary, shall accomplish the following tasks:

- 4 a) Task 1: Implement the Cleanup Action Plan (CAP), Exhibit B and the
5 Sampling/Monitoring and Contingency Plan, Exhibit F, including but not
6 limited to the following:
- 7 i. Excavation of TPH-impacted soil to the extent practicable, as
8 outlined in Exhibit B.
- 9 ii. Implement ambient air and groundwater sampling program to
10 evaluate the effectiveness of the remedial action, as outlined in Exhibits B
11 and F.
- 12 iii. Implement indoor air monitoring program if buildings are to be
13 placed at the Site, as outlined in Exhibit F.
- 14 iv. Design and implement contingency plan, if necessary, as outlined
15 in Exhibit F.
- 16 b) Task 2: Provide for public participation.
- 17 c) Task 3: Provide Remedial Design.
- 18 d) Task 4: Implement the Compliance Monitoring Program as outlined in
19 the CAP (Exhibit B) and the Sampling/Monitoring and
20 Contingency Plan (Exhibit F), which also includes:
- 21 i. Protection Monitoring.
- 22 ii. Performance Monitoring.
- 23 iii. Confirmation Monitoring.
- 24 e) Task 5: Implement Schedule attached hereto as Exhibit C.

25 Defendants agree not to perform any remedial actions on the Site that are inconsistent with the
26 remedial actions required under this Consent Decree.

37. Defendants shall obtain any and all state, federal, or local permits required by
applicable law before commencing the remedial action at the Site, except as provided in

1 Section XXI. Defendants shall prepare a Site Safety and Health Plan in accordance with WAC
2 173-340-810 and the most recent OSHA, WISHA, Ecology, and EPA guidance and applicable
3 regulations, for Ecology review. Defendants shall also provide a security system at the Site
4 designed to prevent entry by unauthorized persons during the excavation work.

5 39. Defendants shall be prohibited from using the Site in a manner likely to cause or
6 contribute to the existing release, interfering with remedial actions performed or that may be
7 needed at the Site, or increasing health risks to persons or risks to the environment at or in the
8 vicinity of the Site. Defendants agree to ensure that its Successors in Interest and Assigns are
9 prohibited from using the Site in a manner likely to cause or contribute to the existing release,
10 interfering with remedial actions that are performed or may be needed at the Site, or increasing
11 health risks to persons or risks to the environment at or in the vicinity of the Site.

12 40. Defendants shall file a Restrictive Covenant with the deed for the Site if the
13 concentrations of hazardous substances on the Site exceed the cleanup levels following soil
14 sampling (Exhibit B, Section 8.0), groundwater monitoring (Exhibit F, Section 3.0) and ambient
15 air sampling (Exhibit F, Section 1.0), which will be performed to evaluate the effectiveness of
16 the excavation action, as outlined in the CAP (Exhibit B). The specific provisions to be included
17 in the Restrictive Covenant will be determined based on the media impacted by the residual
18 hazardous substances on the Site. The alternative provisions that may be included in the
19 Restrictive Covenant are outlined in Exhibit E. If a Restrictive Covenant is required under this
20 section, Defendants shall provide Ecology with a copy of the version of the Covenant proposed
21 for filing at least seven (7) days prior to the actual filing of the document. If a Restrictive
22 Covenant is required, Defendants, or their Successors in Interest and Assigns, after
23 confirmational monitoring has shown that contaminants are no longer present at the Site above
24 applicable cleanup levels, may record an instrument that provides that the Restrictive Covenants
25 provided in Exhibit E shall no longer limit uses of the Site or be of any further force or effect, but
26 only with Ecology's prior written approve of such instrument.

41. If permanent heated buildings with closed basements or first floors shall be placed on the Site and if, after active remedial measures, confirmational monitoring and sampling and analysis to evaluate indoor air issues have been completed, soil vapor at the Site exceeds applicable cleanup levels with respect to indoor air, provisions in Section 2.0 of the Sampling/Monitoring and Contingency Plan (Exhibit F) regarding the placement of permanent heated buildings and engineering controls for soil vapors shall be implemented for any such proposed building. Defendants shall file a restrictive covenant with the deed if engineering controls are required to address indoor air issues. This section shall survive and continue in full force and effect after the Decree is dismissed.

VIII. ECOLOGY COSTS

42. Defendants agree to pay past costs from January 2, 2001, to present and future costs incurred by Ecology pursuant to this Decree. These costs shall include work performed by Ecology or its contractors for, or on, the Site under Chapter 70-105D RCW, for investigations, remedial actions, oversight and administration associated with this Decree (including preparation and negotiation of this Decree). Ecology costs shall include costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2). Defendants agree to pay the required amount within ninety (90) days of receiving from Ecology an itemized statement of costs that includes a summary of costs incurred, an identification of involved staff, and the amount of time spent by involved staff members on the project. A general statement of work performed will be provided upon request. Itemized statements and costs shall be prepared quarterly. Failure to pay Ecology costs within ninety (90) days of receipt of the itemized statement will result in interest charges as allowed by law. Defendants reserve the right to review and approve any charges prior to payment. Any dispute regarding remedial and investigation costs for the Site shall be subject to dispute resolution pursuant to Section XIV. Defendants reserve the right to pay the undisputed portion of an invoice and not pay the disputed portion.

1 **IX. DESIGNATED PROJECT COORDINATORS**

2 43. The project coordinator for Ecology is:

3 Nnamdi Madakor
4 Toxics Cleanup Program
5 Department of Ecology
6 Northwest Regional Office
7 3190 160th Avenue Southeast
8 Bellevue, WA 98008
9 Telephone: (425) 649-7000

10 The project coordinator for Defendants is:

11 Chris Rogers
12 Seattle Art Museum
13 P.O. Box 22000
14 Seattle, WA 98122
15 Telephone: (206) 654-3221

16 44. Each project coordinator shall be responsible for overseeing the implementation
17 of this Decree. The Ecology project coordinator will be Ecology's designated representative at
18 the Site. To the maximum extent possible, communications between Ecology and Defendants
19 and all documents, including reports, approvals, and other correspondence concerning the
20 activities performed pursuant to the terms and conditions of this Decree, shall be directed
21 through the project coordinators. The project coordinators may designate, in writing, working-
22 level staff contacts for all or portions of the implementation of the Work to be Performed,
23 Section VII, and attached Cleanup Action Plan. The project coordinators may agree to minor
24 modifications to the work to be performed without formal amendments to this Decree.

25 45. Any party may change its respective project coordinator. Written notification
26 shall be given to the other parties at least ten (10) calendar days prior to the change.

27 **X. PERFORMANCE**

28 46. All work performed pursuant to this Decree shall be under the direction and
29 supervision, as necessary, of a professional engineer or hydrogeologist, or equivalent, with

1 experience and expertise in hazardous waste site investigation and cleanup. Any construction
2 work must be under the supervision of a professional engineer. Defendants shall notify Ecology
3 in writing as to the identity of such engineer(s) or hydrogeologist(s), or others and of any
4 contractors and subcontractors to be used in carrying out the terms of this Decree, in advance of
5 their involvement at the Site.

6 **XI. CERTIFICATION OF DEFENDANTS**

7 47. Defendants represent and certify that, to the best of their knowledge and belief,
8 they have fully and accurately disclosed to Ecology the information currently in their possession
9 or control that relates to the environmental conditions at and in the vicinity of the Site, or to
10 Defendants' right and title thereto.

11 48. Defendants represent and certify that they did not cause or contribute to a release
12 or threatened release of hazardous substances at the Site and are not otherwise potentially liable
13 under RCW 70.105D.040(1), except by becoming owners and/or operators of the Site.

14 **XII. TRANSFER OF INTEREST IN PROPERTY**

15 49. Prior to any voluntary or involuntary conveyance or relinquishment of title,
16 easement, leasehold, or other interest in any portion of the Site, Defendants shall provide for
17 continued compliance with all of the conditions of this Decree. Prior to transfer of any legal or
18 equitable interest in all or any portion of the Site during the effective period of this Decree,
19 Defendants shall provide a copy of this Decree to any prospective purchaser, lessee, transferee,
20 assignee, or other successor in interest of the Site; and, at least thirty (30) days prior to any
21 transfer, Defendants shall notify Ecology of said contemplated transfer. This Paragraph shall not
22 apply to transfer of any legal or equitable interest by one Defendant to another Defendant.

23 50. Defendants shall ensure that any future use of the Site is restricted such that
24 activities that would contribute to the existing release or threatened release, interfere with
25 remedial actions at the Site, or increase health risks to persons or risks to the environment at or in
26 the vicinity of the Site are prohibited.

1 51. Defendants shall also ensure that all future Successors in Interest and Assigns in
2 the Site will provide for compliance with all of the conditions of this Decree.

3 **XIII. AMENDMENT TO CONSENT DECREE**

4 52. This Decree may only be amended by a written stipulation among the parties to
5 this Decree that is thereafter entered and approved by order of the Court. Such amendment shall
6 become effective upon entry by the Court or upon a later date if such date is expressly stated in
7 the parties' written stipulation or the Court so orders.

8 53. Amendments may cover any subject or be for any purpose agreed to by the parties
9 to this Decree. If Ecology determines that the subject of an amendment requires public input,
10 Ecology shall provide thirty (30) days public notice prior to seeking entry of the amendment from
11 the Court.

12 **XIV. DISPUTE RESOLUTION**

13 54. In the event a dispute arises as to an approval, disapproval, proposed
14 modification, or other decision or action by Ecology's project coordinator, the parties shall use
15 the dispute resolution procedure set forth below.

- 16 a) Upon receipt of the Ecology project coordinator's decision, Defendants
17 have fourteen (14) days to notify Ecology's project coordinator of any
18 objection to the decision.
- 19 b) The parties' project coordinators shall then confer in an effort to resolve
20 the dispute. If the project coordinators cannot resolve the dispute within
21 fourteen (14) days of Defendants' objection, Ecology's project coordinator
22 shall issue a written decision.
- 23 c) Defendants may then request Ecology management review of the decision.
24 This request shall be submitted in writing to the Toxics Cleanup Program
25 Manager within seven (7) days of receipt of Ecology's project
26 coordinator's written decision.
- d) Ecology's Toxics Cleanup Program Manager shall conduct a review of the
dispute and shall issue a written decision regarding the dispute within
thirty (30) days of Defendants' request for review. The Toxics Cleanup

1 Program Manager's decision shall be Ecology's final decision on the
2 disputed matter.

3 55. If Ecology's final written decision is unacceptable to Defendants, Defendants
4 shall have the right to submit the dispute to the Court for resolution. The parties agree that one
5 judge should retain jurisdiction over this case and shall as necessary, resolve any dispute arising
6 under this Decree. In the event Defendants present an issue to the Court for review, the Court
7 shall review the action or decision of Ecology under an arbitrary and capricious standard of
8 review.

9 56. The parties agree to use the dispute resolution process in good faith and agree to
10 expedite, to the extent possible, the dispute resolution process whenever it is used. When either
11 party uses the dispute resolution in bad faith or for purposes of delay, the other party may seek
12 sanctions.

13 57. The implementation of these dispute resolution procedures shall not provide a
14 basis for delay of any activities required in this Decree, unless Ecology agrees in writing to a
15 schedule extension or the Court so orders.

16 **XV. CONTRIBUTION PROTECTION**

17 58. With regard to claims for contribution against Defendants for matters addressed in
18 this Decree, Ecology agrees that Defendants are entitled to protection from contribution actions
19 or claims as is provided by MTCA, RCW 70.105D.040, or as otherwise provided by law.

20 **XVI. COVENANT NOT TO SUE UNDER MTCA; REOPENERS**

21 59. In consideration of compliance by Defendants with the terms and conditions of
22 this Decree, Ecology agrees that compliance with this Decree shall stand in lieu of any and all
23 administrative, legal, and equitable remedies and enforcement actions available to Ecology
24 against Defendants for the release or threatened release of known or suspected hazardous
25 substances at the Site covered by the terms of this Decree. Ecology covenants not to sue
26

1 Defendants, its Successors in Interest and Assigns for matters covered by the terms of this
2 Decree, provided that Defendants, or its Successors in Interest and Assigns have substantially
3 complied with this Decree.

4 A. Reopeners: In the following circumstances the State of Washington may
5 exercise its full legal authority to address releases of hazardous substances at the Site
6 notwithstanding the Covenant Not to Sue set forth above:

- 7 1. In the event Defendants fail to comply with the terms and
8 conditions of this Decree, including all attachments, and, after
9 written notice of noncompliance, fails to come into compliance.
- 10 2. In the event new information becomes available regarding factors
11 previously unknown to Ecology, and Ecology determines, in light
12 of this information, that further remedial action is necessary at the
13 Site to protect human health or the environment.
- 14 3. In the event the remedial action conducted at the Site fails to meet
15 the requirements set forth in Section VII of this Decree and the
16 attached Cleanup Action Plan.
- 17 4. In the event the Site is used for any activities that contribute to the
18 existing release or threatened release, interfere with remedial
19 actions that may be needed at the Site, or increase health risks to
20 persons at or in the vicinity of the Site.

21 B. Applicability. The Covenant Not To Sue set forth above shall have no
22 applicability whatsoever to:

- 23 1. Criminal liability;
- 24 2. Any Ecology action against PLPs not party to this Decree; and
- 25 3. Any claims by the State for Natural Resources Damages.

26 **XVII. DEFENDANTS' RESERVATION OF RIGHTS**

60. Defendants reserve all rights and defenses that they may have and which are not
otherwise addressed in the Decree.

61. Except as provided herein for Defendants, this Decree does not grant any rights or affect any liabilities of any person, firm or corporation or subdivision or division of state, federal, or local government.

XVIII. DISCLAIMER

62. This Decree does not constitute a representation by Ecology that the Site is fit for any particular purpose.

XIX. RETENTION OF RECORDS AND 5-YEAR REVIEW

63. Defendants shall retain all records, reports, documents, and underlying data in its possession relevant to the implementation of this Decree during the pendency of this Decree and for a period of ten years following the termination of this Decree pursuant to Paragraph 80, and shall insert in contracts with project contractors and subcontractors a similar records retention requirement. Upon request of Ecology, Defendants shall make all non-archived records available to Ecology and allow Ecology reasonable access for record review. All archived records shall be made available to Ecology by Defendants within a reasonable period of time.

XX. SITE ACCESS

64. Defendants grant to Ecology, its employees, agents, contractors, and authorized representatives, an irrevocable right to enter upon the Site, with reasonable notice and at any reasonable time, for purposes of allowing Ecology to monitor or enforce compliance with this Decree or to institute other necessary cleanup actions. Ecology or any Ecology authorized representatives shall have the authority to enter and freely move about the Site at all reasonable times for the purposes of, inter alia: inspecting records, operation logs, and contracts related to the work being performed pursuant to this Decree; reviewing Defendants' progress in carrying out the terms of this Decree; conducting such tests or collecting such samples as Ecology may reasonably deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Decree; and verifying the data submitted to

1 Ecology by the Defendants. All parties with access to the Site pursuant to this Paragraph shall
2 comply with approved health and safety plans.

3 65. Notwithstanding any provision of this Decree, Ecology retains all of its access
4 authorities and access rights, including enforcement authorities related thereto, under MTCA and
5 any other applicable state statute, regulation or order. Nothing in this Decree shall limit any right
6 of access Ecology may have concerning releases of hazardous substances not addressed by this
7 Decree. Ecology's entry onto the Site for purposes of monitoring or enforcing compliance with
8 this Decree or implementing further remediation at the Site may interfere with Defendants' full
9 use of the Site. The right of entry granted in this Section is in addition to any right Ecology may
10 have to enter onto the Site pursuant to specific statutory or regulatory authority. Defendants
11 further agree to cooperate with Ecology and other PLPs as reasonably necessary to facilitate any
12 further cleanup or monitoring Ecology determines is required on the Site. Consistent with
13 Ecology's responsibilities under state and federal law, Ecology, and any persons acting for it,
14 shall use reasonable efforts to minimize any interference and shall use reasonable efforts not to
15 interfere with the operations of Defendants by any such entry. In the event Ecology enters the
16 Site for reasons other than emergency response, Ecology agrees that it shall provide reasonable
17 advance notice to Defendants of any planned entry, as well as schedules and locations of activity
18 on the Site. Ecology further agrees to accommodate reasonable requests that it modifies its
19 scheduled entry or activities at the Site.

20 **XXI. OTHER APPLICABLE LAWS**

21 66. All actions carried out by Defendants pursuant to this Decree shall be done in
22 accordance with all applicable federal, state, and local requirements, including applicable
23 permitting requirements. Pursuant to RCW 70.105D.090(1), the known and applicable
24 substantive requirements of Chapters 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW, and
25 any laws requiring or authorizing local government permits or approvals for remedial action,
26

1 have been included in the CAP and are incorporated by reference herein as binding and
2 enforceable requirements in this Decree.

3 67. Defendants have a continuing obligation to determine whether additional permits
4 or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial
5 action under this Decree. In the event either Defendants or Ecology determines that additional
6 permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the
7 remedial action under this Decree, it shall promptly notify the other party of this determination.
8 Ecology shall determine whether Ecology or Defendants shall be responsible to contact the
9 appropriate state and/or local agencies. If Ecology so requires, Defendants shall promptly
10 consult with the appropriate state and/or local agencies and provide Ecology with written
11 documentation from those agencies of the substantive requirements those agencies believe are
12 applicable to the remedial action. Ecology shall make the final determination on whether the
13 additional substantive requirements must be met by Defendants and on how Defendants must
14 meet those requirements. Ecology shall inform Defendants in writing of these requirements and
15 Defendants shall have an opportunity to comment on such requirements. Once established by
16 Ecology, the additional requirements shall be enforceable requirements of this Decree.
17 Defendants shall not begin or continue the remedial action potentially subject to the additional
18 requirements until Ecology makes its final determination.

19 68. Ecology shall ensure that notice and opportunity for comment is provided to the
20 public and appropriate agencies prior to establishing the substantive requirements under this
21 section.

22 69. Pursuant to RCW 70.105D.090(2), in the event that Ecology determines that the
23 exemption from complying with the procedural requirements of the laws referenced in RCW
24 70.105D.090(1) would result in the loss of approval from a federal agency necessary for the state
25 to administer any federal law, such exemption shall not apply and Defendants shall comply with
26

1 both the procedural and substantive requirements of the laws referenced in RCW
2 70.105D.090(1), including any requirements to obtain permits.

3 **XXII. SAMPLING, DATA REPORTING, AND AVAILABILITY**

4 70. With respect to the implementation of this Decree, Defendants shall make the
5 results of all sampling, laboratory reports, and/or test results generated by them, or on their behalf
6 available to Ecology and shall submit these results in accordance with Section XXIII of this
7 Decree.

8 71. If requested by Ecology, Defendants shall allow split or duplicate samples to be
9 taken by Ecology and/or Ecology's authorized representatives of any samples collected by
10 Defendants pursuant to the implementation of this Decree. Defendants shall notify Ecology at
11 least seven (7) working days in advance of any sample collection or work activity at the Site.
12 Ecology shall, upon request, allow split or duplicate samples to be taken, at Defendants' sole
13 expense, by Defendants, or their authorized representatives, of any samples collected by Ecology
14 pursuant to the implementation of this Decree, provided they do not unreasonably interfere with
15 the Department's sampling. Without limiting Ecology's rights under Section XX, Ecology shall
16 endeavor to notify Defendants at least five (5) working days prior to any sampling collection
17 activity.

18 **XXIII. PROGRESS REPORTS**

19 72. Defendants shall submit to Ecology written progress reports that describe the
20 actions taken to implement the requirements of this Decree. The progress report shall be
21 prepared as set forth in the following schedule:

22 *Monthly during the excavation action; and

23 *Quarterly during post-remedial monitoring activities.

24 The progress reports shall contain the following:

25 A. A list of on-Site activities that have taken place during the reporting
26 period;

1 B. Detailed description of any deviations from required tasks not otherwise
2 documented in project plans or amendment requests;

3 C. Description of all deviations from the schedule during the current
4 reporting period and any planned deviations in the upcoming reporting period;

5 D. For any deviations in schedule, a plan for recovering lost time and
6 maintaining compliance with the schedule;

7 E. All data (including laboratory analyses) which, after the QA/QC program
8 has been performed, have been received by Defendants during the past reporting period and an
9 identification of the source of the samples; and

10 F. A list of deliverables for the upcoming reporting period if different from
11 the schedule.

12 73. All progress reports shall be submitted by the tenth day of the month following
13 each reporting period after the effective date of this Decree. Unless otherwise specified, progress
14 reports and any other documents submitted pursuant to this Decree shall be sent by certified mail,
15 return receipt requested, to Ecology's project coordinator.

16 XXIV. EXTENSION OF SCHEDULE

17 74. An extension of schedule shall be granted only when a request for an extension is
18 submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the deadline
19 for which the extension is requested, and when good cause exists for granting the extension. All
20 extensions shall be requested in writing. The request shall specify the reason(s) the extension is
21 needed.

22 75. An extension shall only be granted for such period of time as Ecology determines
23 is reasonable under the circumstances. A requested extension shall not be effective until
24 approved by Ecology. Ecology shall act upon any written request for extension in a timely
25 fashion. It shall not be necessary to formally amend this Decree pursuant to Section XIII when a
26 schedule extension is granted.

76. The burden shall be on Defendants to demonstrate to the satisfaction of Ecology that the request for such extension has been submitted in a timely fashion and that good cause exists for granting the extension. Good cause includes, but is not limited to, the following:

(1) circumstances beyond the reasonable control and despite the due diligence of Defendants, including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by Defendants; or

(2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or (3) endangerment as described in Section XXV.

77. However, neither increased costs of performance of the terms of the Decree nor changed economic circumstances shall be considered circumstances beyond the reasonable control of Defendants.

78. Ecology may extend the schedule for a period not to exceed ninety (90) days, except where an extension is needed as a result of:

- (1) Delays in the issuance of a necessary permit that was applied for in a timely manner; or
- (2) Other circumstances deemed exceptional or extraordinary by Ecology; or
- (3) Endangerment as described in Section XXV.

79. Ecology shall give Defendants written notification in a timely fashion of any extensions granted pursuant to this Decree.

XXV. ENDANGERMENT

80. In the event Ecology determines that activities implementing or in noncompliance with this Decree, or any other circumstances or activities, are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the environment, Ecology may order Defendants to stop further implementation of this Decree for such period of time as needed to abate the danger or may petition the Court for an order as appropriate. During any stoppage of work under this Section, the obligations of Defendants with

1 respect to the work under this Decree that is ordered to be stopped shall be suspended and the
2 time periods for performance of that work, as well as the time period for any other work
3 dependent upon the work that is stopped, shall be extended, pursuant to Section XXIV of this
4 Decree, for such period of time as Ecology determines is reasonable under the circumstances.

5 81. In the event Defendants determines that activities undertaken in furtherance of this
6 Decree or any other circumstances or activities are creating an endangerment to the people on the
7 Site or in the surrounding area or to the environment, Defendants may stop implementation of
8 this Decree for such period of time necessary for Ecology to evaluate the situation and determine
9 whether Defendants should proceed with implementation of the Decree or whether the work
10 stoppage should be continued until the danger is abated. Defendants shall notify Ecology's
11 project coordinator as soon as possible, but no later than twenty-four (24) hours after such
12 stoppage of work, and thereafter provide Ecology with documentation of the basis for the work
13 stoppage. If Ecology disagrees with Defendants' determination, it may order Defendants to
14 resume implementation of this Decree. If Ecology concurs with the work stoppage, Defendants'
15 obligations shall be suspended and the time period for performance of that work, as well as the
16 time period for any other work dependent upon the work that was stopped, shall be extended,
17 pursuant to Section XXIV of this Decree, for such period of time as Ecology determines is
18 reasonable under the circumstances.

19 **XXVI. IMPLEMENTATION OF REMEDIAL ACTION**

20 82. If Ecology determines that Defendants have failed without good cause to
21 implement the remedial action described herein and in the CAP, Ecology may, after notice to
22 Defendants, perform any or all portions of the remedial action that remain incomplete. If
23 Ecology performs all or portions of the remedial action because of Defendants' failure to comply
24 with the obligations under this Decree, Defendants shall reimburse Ecology for the costs of doing
25 such work, provided that Defendants shall not be obligated under this Section to reimburse
26 Ecology for costs incurred for work inconsistent with or beyond the scope of this Decree.

XXVII. PUBLIC PARTICIPATION

83. Ecology shall maintain the responsibility for public participation at the Site. However, Defendants shall cooperate with Ecology with respect to the following public participation activities:

A. Prepare drafts of public notices and fact sheets at important stages of the remedial action, such as the submission of work plans and engineering design reports. Ecology will finalize (including editing if necessary) and distribute such fact sheets and prepare and distribute public notices of Ecology's presentations and meetings;

B. Each party shall notify the other party's project coordinator prior to the preparation of all press releases and fact sheets, and at least one week before major meetings with the interested public and local governments regarding the remediation of the Site. Likewise, Ecology shall notify Defendants prior to the issuance of all press releases and fact sheets, and before major meetings with the interested public and local governments;

C. Participate in public presentations on the progress of the remedial action at the Site. Participation may be through attendance at public meetings to assist in answering questions, or as a presenter;

D. In cooperation with Ecology, arrange and/or continue information repositories to be located at the following locations:

Seattle Public Library
Downtown Branch
Government Documents
1000 4th Avenue, 2nd Floor
Seattle, Washington

Department of Ecology
Northwest Regional Office
3190 160th Avenue Southeast
Bellevue, Washington

1 Seattle Art Museum Library
2 100 University St., 5th Floor
3 Seattle, Washington

4 At a minimum, copies of all public notices, fact sheets, and press releases, all quality assured
5 monitoring data, remedial action plans, supplemental remedial planning documents, and all other
6 similar documents relating to performance of the remedial action required by this Decree shall be
7 promptly placed in these repositories.

8 **XXVIII. DURATION OF DECREE AND RETENTION OF JURISDICTION;
9 CERTIFICATIONS BY ECOLOGY**

10 84. This Decree shall remain in effect and this Court shall retain jurisdiction over both
11 the subject matter of this Decree and the parties for the duration of the performance of the terms
12 and provisions of this Decree for the purpose of enabling any of the parties to apply to the Court,
13 consistent with the dispute resolution process set forth in Section XIV, and the amendment
14 process set forth in Section XIII, for such further order, direction, and relief as may be necessary
15 or appropriate to ensure that obligations of the parties have been satisfied. The Decree shall
16 remain in effect until Defendants have received written notification from Ecology that the
17 requirements of this Decree have been satisfactorily completed. Ecology shall provide such
18 written notification or notice of any deficiencies in the completion of the requirements of this
19 Decree within one hundred and eighty (180) days of receiving notice from Defendants that the
20 requirements of the Decree have been satisfied. Within sixty (60) days of Defendants' written
21 notice that any noted deficiencies have been corrected, Ecology shall provide written notification
22 that the requirements of the Decree have been satisfied or notice of any deficiencies that still
23 remain. Upon receipt of written notification from Ecology that the requirements of this Decree
24 have been satisfactorily completed, the parties shall move the Court to dismiss the Consent
25 Decree. The provisions set forth in Section XV (Contribution Protection), Section XVI
26 (Covenant Not to Sue Under MTCA; Reopeners), Section XXX (Indemnification), and other
such continuing or reserved rights of Defendants or Ecology under this Decree shall survive the

1 dismissal of the Decree pursuant to this paragraph. This Decree shall in no way limit the
2 authority of Ecology to obtain all legal or equitable remedies available against persons not party
3 to this Decree and against all persons, parties or non-parties, for releases of hazardous substances
4 at the Site not covered by this Decree.

5 **XXIX. PUBLIC NOTICE AND WITHDRAWAL OF CONSENT**

6 85. This Decree has been the subject of public notice and comment under RCW
7 70.105D.040(4)(a). As a result of this process, Ecology has found that this Decree will lead to a
8 more expeditious cleanup of hazardous substances, in compliance with applicable cleanup
9 standards, and is in the public interest.

10 86. If the Court withdraws its consent, this Decree shall be null and void at the option
11 of any party and the accompanying complaint shall be dismissed without costs and without
12 prejudice. In such an event, no party shall be bound by the requirements of this Decree. This
13 paragraph shall not create a basis for withdrawal of consent or termination of this Decree other
14 than those created by the terms of this Decree or that exist by operation of law or equity.

15 **XXX. INDEMNIFICATION**

16 87. Defendants agree to indemnify and save and hold the State of Washington, its
17 employees, and agents harmless from any and all claims or causes of action for death or injuries
18 to persons or for loss or damage to the Site arising from or on account of acts or omissions of
19 Defendants, their officers, employees, agents, or contractors in entering into and implementing
20 this Decree. However, Defendants shall not indemnify the State of Washington nor save nor
21 hold its employees and agents harmless from any claims or causes of action arising out of the
22 negligent acts or omissions of the State of Washington, or employees or agents of the State, or its
23 contractors in implementing the activities pursuant to this Decree.

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XXXI. CLAIMS AGAINST THE STATE

88. Without in any way impairing the rights of the MDA or the City to seek and utilize grants and loans pursuant to RWC 70.105D.070, Defendants hereby agree that they will not seek to recover any costs accrued in implementing the remedial action required by this Decree from the State of Washington or any of its agencies and further that Defendants will make no claim against the state toxics control account or any local toxics control account for any costs incurred in implementing this Decree. Except as provided above, however, Defendants expressly reserve their rights to seek to recover any costs incurred in implementing this Decree from any other PLP.

XXXII. EFFECTIVE DATE

89. This Decree is effective only after the date on which title to the Site vests in Defendants and the date on which the Court enters the Decree.

So ordered this ____ day of _____, 2001.

JUDGE
King County Superior Court

1 The undersigned parties enter into this Prospective Purchaser Consent Decree on the date
2 specified below.

3 THE SEATTLE ART MUSEUM
4
5

6 _____
Lynn Manolopoulos, WSBA #21069

7 DATED _____

DATED _____

8
9 CITY OF SEATTLE
10

11 _____
Peter Hapke, WSBA #23159

12 DATED _____

DATED _____

13
14 MUSEUM DEVELOPMENT AUTHORITY
15

16 _____
Lynn Manolopoulos, WSBA #21069

17 DATED _____

DATED _____

18
19 CHRISTINE O. GREGOIRE
20 Attorney General, by and through
21

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

22 STEVEN J. THIELE, WSBA #20275
23 Assistant Attorney General
24 Attorney for Plaintiff
25 State of Washington
26 Department of Ecology

James Pendowski
Program Manager
Toxics Cleanup Program

DATED _____

DATED _____